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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HAROLD LAMONT OTEY,

Petitioner,

vs.

THE STATE OF NEBRASKA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

MICHAEL L. SCHLEICH
of MORSMAN, FIKE, DAVIS
& SCHLEICH, P.C.
475 Continental Building
Omaha, Nebraska 68102
(402) 342-4323
Attorneys for Petitioner

LAW OFFICES OF
Morsman, Fike, Davis & Schleich, P.C.
475 CONTINENTAL BUILDING
OMAHA, NEBRASKA 68102 1788

QUESTIONS PRESENTED

1. Was the defendant denied the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments?

2. Was the defendant denied his Sixth Amendment right to cross examine witnesses when the lower court denied him the opportunity to appear at the hearing on his Motion to Vacate Sentence?

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STATE OF NEBRASKA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Nebraska entered on July 2, 1982.

OPINION BELOW

The opinion of the Supreme Court of the State of Nebraska in the case of Harold Lamont Otey is reported at 212 Neb. 103, 321 N.W.2d 453 (1982), attached as Appendix A.

JURISDICTION

The judgment of the Supreme Court of the State of Nebraska was rendered on July 2, 1982 and entered on that date. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States.

2. This case involves the following provisions of Nebraska law. (See Appendix B).

Neb. Rev. Stat. 1943, Reissue 1943, 29-3001

STATEMENT OF THE CASE

On January 26, 1978, the defendant was arrested in Florida on a warrant issued by the Municipal Court of Omaha, Douglas County, Nebraska, charging him with a first degree murder in the perpetration of a sexual assault in the first degree. On January 27, 1978, the defendant waived extradition to the State of Nebraska.

The defendant was returned to Omaha, Douglas County, Nebraska, on or about the 30th day of January, 1978. He appeared in the Municipal Court of Omaha, Douglas County, Nebraska, on the 31st day of January, 1978, at which time the court appointed the Public Defender of Omaha, Douglas County, Nebraska, to represent the defendant in this proceeding. Preliminary examination was waived at this proceeding, the defendant was ordered held without bond, and was bound over to the District Court of Douglas County, Nebraska, for trial.

On the 9th day of February, 1978, the defendant appeared in the District Court of Douglas County, Nebraska, for an arraignment, at which time the Public Defender was again appointed in District Court to represent the defendant. The defendant was duly arraigned, at which time he stood mute, and the court entered a not guilty plea on defendant's behalf.

On the 31st day of March, 1978, counsel for the defendant filed a motion for continuance, including a waiver of the six month speedy trial provision. This motion was denied after argument on April 5, 1978. The trial commenced on April 6, 1978. Upon conclusion of the testimony and evidence, the jury was instructed and after due deliberation returned a verdict finding the defendant guilty of the offense charged.

The defendant was represented during the trial by Tom Riley of the Douglas County Public Defender's Office. The first time the defendant ever conferred with Tom Riley was on the day of his arraignment when he visited with him for a few minutes (E51:6,7). Between arraignment and the start of the trial the defendant only saw Riley on four or five occasions for fifteen to twenty minutes each time (E51:7). The defendant was not given adequate opportunity to review the police reports and, in fact, was not even aware of who the State intended to call as witnesses against him (E51:18). Riley only

saw the defendant once between the guilty verdict and sentencing. He failed to advise the defendant that he had the right to present witnesses in his behalf at sentencing or that the defendant himself could testify. The uncontradicted testimony of the defendant was that he would have called a number of character witnesses to testify at sentencing if he had known he had the opportunity to do so (E51:19,20,21).

The record of the original proceedings establishes that Riley did not adequately prepare for this case because he did not have time to so prepare. The record of the proceedings and, in fact, the in court admissions of Riley establish that he was unprepared.

> Mr. Riley: Your Honor, the basis for the continuance, there are a number of reasons. First, the defendant I believe was bound over to District Court on or about the 31st day of January, 1978. His arraignment was February the 9th of '78. Since his arraignment and during the period of the week of the 9th, and since his arraignment to this date, there have been four weeks of jury cases going on, during which period of time I was in trial, I would venture to say, all but two of those days. During that period, of course, I had minimal, if any contact with the defendant himself while I was doing trials on those cases. I would say that I have talked to the defendant probably six to eight times in the jail for a period of, I'd say, nine hours at the most.
>
> Mr. Cooper did supply me with the police reports on request, they are volunminous, and I have read them over numerous times. There are witnesses that the defendant has requested counsel to locate. Now, he knows these people by nicknames, by track name, et cetera, and really, I cannot tell anyone exactly how to locate them. They are mostly transients who follow tracks around and they are very difficult to locate.
>
> * * *
>
> The Court: Do you think that a third-party stranger is going to have a better recollection of that fact than the defendant himself?
>
> Mr. Riley: That I don't know. What I am saying is that there may be a reason that one of these people, who he may have been with on June 11th, would recall June 11th for some reason or another. I don't know, but, be that as it may, I have not been able to locate and talk individually to two people that he specifically asked me to find, Donald Lawrence, I believe is one of them, "Satch", and the other one is Herb Roberts. Now I have got them kind of tracked down, but I have not talked to them personally. We are without an investigator in our office.
>
> * * *
>
> Mr. Riley: I am not asking for seventeen months. There was an indication that Mr. Otey had a prior psychiatric history of some, at least to my knowledge, minor consequence, but Dr. Brown indicates that he feels that he is opening up to him and that he may be able to say something and he may not be able to say something, but what I am getting at is this: There is also an EEG scheduled.

The Court: When is it scheduled?

Mr. Riley: I talked to Dr. Brown about fifteen minutes ago.

The Court: Well, if Dr. Brown were concerned about it, I would assume that Dr. Brown could get that done within the next half hour and, if he is not concerned about it, then I don't think it has any particular validity with regard to a continuance.

Mr. Riley: Dr. Brown is not the defendant, I'm not the defendant and, what his feelings are, I don't know, but this isn't a burglary case.

(Original Bill of Exceptions, 123:24, 127:25).

Prior to the commencement of the trial Riley had not discussed with the defendant whether he would testify or if he did, what the nature of his testimony would be (E51:13,14). Riley did however state during his opening statement that the defendant would in fact testify in his own behalf (E49). However, when it came time to call the defendant, Riley made the decision not to call his client (E51:15).

The defendant, after his conviction was affirmed by the Nebraska Supreme Court (State v. Otey, 205 Neb. 90, 287 N.W.2d 36 [1979]), filed an appropriate motion in the District Court for post conviction relief. An evidentiary hearing was held and the motion was denied on September 24, 1981. The Nebraska Supreme Court affirmed that ruling in its opinion filed July 2, 1982 (Appendix A). The defendant files this petition seeking a Writ of Certiorari to review that judgment of the Nebraska Supreme Court.

REASONS FOR GRANTING THE WRIT

I.

THE DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN THAT TRIAL COUNSEL DID NOT PERFORM AT LEAST AS WELL AS ONE WITH ORDINARY CRIMINAL LAW SKILL AND TRAINING NOR DID TRIAL COUNSEL ADEQUATELY PROTECT HIS CLIENT'S INTEREST.

The defendant's primary basis for his motion to vacate sentence is that he was denied the effective assistance of counsel at the trial level. In determining whether the defendant was given effective assistance, the following standard, as set forth in State v. Journey, 207 Neb. 717, 301 N.W.2d 82 (1981), applies:

Nebraska employs a two-part test for determining whether an attorney has effectively counseled a criminal defendant. First, counsel must perform at least as well as one with ordinary criminal law skill and training in his or her region. Counsel must also conscientiously protect his client's interests. State v. Leadinghouse, 192 Neb. 485, 222 N.W.2d 573 (1974); State v. Lang 202 Neb. 9, 272 N.W.2d 755 (1978). A defendant challenging compentency of counsel has the burden to establish it. State v. Auger, 200 Neb. 53, 262 N.W.2d 187 (1978). In addition, defendant must show that he suffered prejudice in the defense of his case as a result of his attorney's actions or inactions. State v. Mays, 203 Neb. 487, 279 N.W.2d 146 (1979); State v. Lang, supra; State v. Bartlett, 199 Neb. 471, 259 N.W.2d 917 (1977).

The motion to vacate sentence was filed pursuant to the Nebraska Post Conviction Act, Neb. Rev. Stat. §29-3001, et seq. According to §29-3001 these actions are civil in nature notwithstanding the fact they are filed as a part of the original criminal proceeding. The significance of this fact is that the defendant must only prove his claims by a preponderance of the evidence rather than being required to prove his claims beyond all reasonable doubt. State v. Halsey, 195 Neb. 432, 238 N.W.2d 249 (1976). The facts established at the hearing as well as the record of the original proceeding clearly show that the defendant was entitled to the relief sought.

A. TRIAL COUNSEL FAILED TO ADEQUATELY PREPARE FOR THE TRIAL OF THIS MATTER.

The defendant's deposition (E51) which was received in evidence at the hearing on the motion to vacate sentence establishes that Mr. Riley was not properly prepared to represent the defendant when his case was called for trial. The defendant and his court-appointed attorney only met on four or five occasions prior to the trial commencing. All of these meeting were brief and at none of them were the facts of the case discussed.

Even though Mr. Riley testified at the hearing on the Motion to Vacate that he had adequate time to prepare for the trial, the admissions he made prior to the actual trial commencing fully corroborate the deposition testimony of the defendant. As set forth in the statement of the case, Riley advised the trial court of the following:

(1) That there had only been eight or nine weeks between the arraignment and the scheduled start of trial;

(2) That he had been conducting jury trials for four of those weeks;

(3) That during those four weeks he had minimal if any contact with the defendant;

(4) That he had only talked to the defendant six to eight times for a total maximum of nine hours; and

(5) That he had "kind of tracked down" witnesses but had been unable to talk to them.

The above firmly shows that Mr. Riley had not devoted the time he should have to the preparation of an adequate defense for the defendant. Perhaps this a due to the actions of the trial court in requiring Mr. Riley to proceed to trial without having adequate time to properly prepare. But even if that be the reason for Mr. Riley not being prepared it does not negate the plain fact that Mr. Riley's lack of adequate preparation denied the defendant his Sixth Amendment right to effective assistance of counsel.

In determining whether the defendant received the effective assistance of counsel several courts have looked to the American Bar Association Standards for Criminal Justice, Standards Relating to the Defense Function for guidance. See United States v. DeCoster, 487 F.2d 1197 (D. C. Cir. 1979) and cases cited therein.

As stated by the DeCoster court, those standards provide in part that:

(1) Counsel should confer with his client without delay and as often as necessary to elicit matters of defense, or to ascertain that potential defenses are unavailable. Counsel should also discuss fully potential strategies and tactical choices with his client.

* * *

(3) Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. The Supreme Court has noted that the adversary system requires that "all available defenses are raised" so that the government is put to its proof. This means that in most cases a defense attorney, or his agent, should interview not only his own witnesses but also those that the government intends to call, when they are accessible. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. And, of course, the duty to investigate also requires adequate legal research.

If a defendant shows a substantial violation of any of these requirements he has been denied effective representation unless the government, "on which is cast the burden of proof once a violation of these precepts is shown, can establish lack of prejudice thereby." Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968). Two factors justify this requirement. First, in our constitutionally prescribed adversary system the burden is on the government to prove guilt. A requirement that the defendant show prejudice, on the other hand, shifts the burden to him and makes him establish the likelihood of his innocence. It is no answer to say that the appellant has already had a trial in which the government was put to its proof because the

heart of his complaint is that the absence of effective assistance of counsel has deprived him of a full adversary trial.

Second, proof of prejudice may well be absent from the record precisely because counsel has been ineffective. For example, when counsel fails to conduct an investigation, the record may not indicate which witnesses he could have called, or defenses he could have raised.

United States v. DeCoster, supra at 1204.

In this particular instance the defense attorney did not live up to the above cited requirements. He did not adequately confer with his client nor did he conduct an appropriate investigation into the facts of the matter. Mr. Riley's failure to locate and interview witnesses was obviously prejudicial to the defendant notwithstanding the fact that the defendant "admitted" to having committed the crime in question. The only solid evidence that independently corroborated the defendant's alleged confession was the testimony that the defendant was in possession of a stereo that was taken at the time the crime in question was committed. Not only was this critical to connecting the defendant to the crime itself, but it was specifically relied upon by the sentencing panel to establish an aggrevating circumstance so as to allow imposition of the death penalty, i.e., the murder was committed to conceal the identity of the perpetrator of a crime (T20,p.5).

The State, in tracing the stereo to the defendant, established that the defendant sold it to one Pete Reitz. The transcript reflects, however, that a potential witness, "Satch", was present at the sale and told Reitz that he saw the defendant buy the stereo in New Orleans (Original Bill of Exceptions, p. 307). Despite this critical testimony, Satch was not called by the defendant's attorney, and failure to do so was ineffective assistance. "Satch" is the very individual that Riley advised the trial court he had located but with whom he had been unable to talk.

The trial counsel's inadequacy at sentencing should not be overlooked. There is perhaps no more critical stage in a first degree homicide case than the sentencing hearing where a penalty of death could possibly result. Despite this, the attorney failed to confer with the defendant, advise him of his rights or even review the presentence report with him. Additionally, the attorney failed to call witnesses to testify on the defendant's behalf. Again, because

of these failures the defendant was denied his Sixth Amendment rights.

B. TRIAL COUNSEL FAILED TO REQUEST THAT ALL STAGES OF THE PROCEEDING BE RECORDED AND TRANSCRIBED.

It is undisputed that the defense counsel did not request that the opening statement, closing argument or voir dire be recorded and transcribed as a part of the record in this case. The defendant contends that failure to do so in a capital case is error per se and deprives the defendant of an adequate record on which to appeal if a conviction occurs. These portions should be recorded to prevent precisely what occurred in this case, to-wit, alleged error in the opening statement which may not be raised on appeal because a record does not exist. The law in the State of Nebraska supports the defendant's position in this regard:

> "The fact of the matter is that we do not have a record before us which would in any way indicate to us what it was the Harris' counsel said or what the prosecution said in closing. Where it is claimed that an attorney is guilty of misconduct in arguing a case to a jury and it is desired to raise a question on that point for a decision of the Supreme Court, it is necessary that objection be made to the trial court at the time and an adverse ruling had thereon and that the same be made a part of the record by a proper bill of exceptions. Johnson v. Nebraska Public Power Dist., 187 Neb. 421, 191 N.W.2d 594 (1971); Pieper v. City of Scottsbluff, 176 Neb. 561, 126 N.W.2d 865 (1964); Sandomierski v. Fixemer, 163 Neb. 716, 81 N.W.2d 142 (1957). Much of the difficulty with which we are presently confronted would have been easily eliminated had counsel, at the conclusion of the closing arguments, asked for the court reporter and made an offer of proof. Having failed to do that, we are totally at a loss to know what in fact took place. We are unable to review the alleged error with the record in the state it is in. It is the law in Nebraska that, where allegedly prejudicial remarks of counsel do not appear in the bill of exceptions, this court is precluded from considering an assigned error concerning such remarks. State v. Spurgeon, 200 Neb. 719, 265 N.W.2d 224 (1978); State v. Costello, 199 Neb. 43, 256 N.W.2d 97 (1977); State v. Godinez, 190 Neb. 1, 205 N.W.2d 644 (1973). We have likewise held that an assignment of error requiring an examination of evidence cannot prevail on appeal in the absence of a proper bill of exceptions. State v. Pope, 192 Neb. 755, 224 N.W.2d 521 (1974); State v. Kortum, 176 Neb. 108, 125 N.W.2d 197 (1963). This record does not permit us to consider the assignment of error and it must be overruled."

State v. Harris, 205 Neb. 844, 290 N.W.2d 645, 650 (1980).

In the present situation, the defendant was required to resort to extrinsic evidence to attempt to establish his claim of error. This alleged claim of error occurred during the opening statements which were not recorded. Because there is no record, this Court cannot know exactly what in fact occurred or how much the statements made by the defense attorney, either in the opening

or closing statements, actually prejudiced the defendant. The defendant was denied effective assistance of counsel not only because of what his attorney said but also because the attorney failed to see that a record was made so as to preserve the alleged error on appeal. In fact, the Nebraska Supreme Court in affirming the denial of the Motion to Vacate ruled that the defendant failed to adequately prove what his attorney said in his opening. The only reason he could not prove it was because the attorney failed to take the proper steps to preserve the record.

C. THE DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE TRIAL COUNSEL ADVISED THE JURY THAT THE DEFENDANT WOULD TESTIFY IN HIS OWN BEHALF WHEN IN FACT THAT DECISION HAD NOT YET BEEN MADE OR EVEN DISCUSSED WITH THE DEFENDANT.

As stated above, the defendant was somewhat at a disadvantage in arguing this point because he has no record to rely upon. He feels, however, that he established by a preponderance of the evidence that the defense attorney did state in his opening statement that the defendant would testify in his own behalf. In denying that this happened, everyone concerned seems to realize the extremely prejudicial effect this sort of statement would have on a jury. Tom Riley admitted that it always "looks bad" when a defendant does not testify. It takes only common sense to realize that it looks much, much worse to the jury when a defendant does not take the stand after they have been told in opening statement that he will testify and explain the State's evidence against him. From a juror's point of view, this case looked as follows:

(1) I have been told to keep an open mind until both sides present evidence.

(2) I have been told the defendant has confessed and the State will present the confession.

(3) I have been told the defendant will testify and explain his side of the story.

(4) I have heard the confession, but I have not heard the defendant explain his side of it. The defendant's attorney lied to us. The defendant must be guilty or he would have testified as his attorney said he would.

This Court is well aware of the abundance of case law which forbids the State from commenting on the defendant's failure to testify. As stated in the case of State v. Brooks, 189 Neb. 592, 204 N.W.2d 86 (1973):

The rule is one of long standing in this state and there is no justification for the failure of a prosecuting attorney to abide by it.

It should clearly be considered ineffective assistance of counsel when the defense attorney himself in effect highlights the defendant's failure to testify. Not only did the defense attorney state that the defendant would testify in his opening statement but, while we have no record to rely on to prove this, the attorney must have had to try to explain his opening statement, vis-a-vis the defendant not taking the stand, in his closing argument, again highlighting the defendant's failure to testify.

Because of the opening statement, the defendant was denied the effective assistance of counsel, and, in reality, was denied any chance whatsoever of the jury giving fair consideration to his verdict.

II.

THE DEFENDANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES AGAINST HIM AT THE HEARING ON THE MOTION TO VACATE SENTENCE BECAUSE THE DISTRICT COURT ORDERED THAT THE HEARING BE HELD OUTSIDE OF THE DEFENDANT'S PRESENCE.

The lower court, over the objection of the defendant, ordered that the hearing on the defendant's Motion to Vacate Sentence be held outside the presence of the defendant. The Post Conviction Act specifically provides that a hearing be held unless the motion, files and records of the case show that the prisoner is not entitled to relief. Neb. Rev. Stat. 1943 §29-3001. In this particular case, the files and records did not clearly show that the defendant was not entitled to relief so the lower court ordered that a hearing be held. To do so without giving the defendant an opportunity to personally appear and confront the witness against him, i.e., Mr. Riley, denied the defendant his rights under the Sixth Amendment of the United States Constitution.

The defendant is well aware of the fact that the statute provides, and the Nebraska Supreme Court has held, that personal presence of a petitioning prisioner is not always required. See State v. Woods, 180 Neb. 282, 142 N.W.2d 339 (1966). The defendant's position, however, is that in this particular case he should have been present to assist his new attorney in properly cross-examining Mr. Riley.

The right to confront and cross-examine witnesses has been held to be one of the "minimum requirements to due process". Morrissey v. Brewer, 408 U.S. 471, 489 (1972). This right is afforded criminal defendants both at trial as well as some post conviction stages of the criminal trial process. The Supreme Court has extended his right to both parole revocation hearings, Morrissey v. Brewer, supra, as well as probation revocation hearings. Gagnon v. Scarpelli, 411 U.S. 778 (1973). The court in these two cases determined that although parole and probation revocation are not stages of a criminal prosecution, both result in a loss of liberty. Because of this the court ruled that minimum requirements of due process, including the right to confront and cross-examine witnesses, apply.

The same consideration, i.e., loss of liberty, is involved in the defendant's Motion to Vacate Sentence. Particularly this is so where, as in this case, the sentence imposed upon the defendant is the death penalty. Whenever the State deems it appropriate to deprive an individual of his life, this Court should insure that the individual be afforded at least minimum due process. This would of course include an opportunity to personally confront witnesses called to testify against him.

CONCLUSION

For all the above reasons, a Writ of Certiorari should issue to review the judgment of the Supreme Court of the State of Nebraska.

Respectfully Submitted,

HAROLD LAMONT OTEY, Petitioner,

By: Michael L. Schleich

Michael L. Schleich
of MORSMAN, FIKE, DAVIS
& SCHLEICH, P.C.
475 Continental Building
Omaha, Nebraska 68102
(402) 342-4323
Attorneys for Plaintiff

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THE STATE OF NEBRASKA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Petitioner, Harold Lamont Otey, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of the State of Nebraska without prepayment of costs, and to proceed in forma pauperis pursuant to Rule 46.

The Petitioner's Affidavit in support of this Motion, with certified copies of previous orders in this regard from the District Court of Douglas County, Nebraska, is attached hereto.

HAROLD LAMONT OTEY, Petitioner,

By Michael L Schleich

Michael L. Schleich
of MORSMAN, FIKE, DAVIS
& SCHLEICH, P.C.
475 Continental Building
Omaha, Nebraska 68102
(402) 342-4323
Attorneys for Plaintiff